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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.	Application 05-02-027

ADMINISTRATIVE LAW JUDGE'S RULING DENYING APPLICANTS' MOTION TO STRIKE QWEST AND COX TESTIMONY AND MOTION OF QWEST FOR A "PROTECTIVE ORDER"

This ruling addresses two related motions, both filed July 19, 2005: (1) the Motion of the Joint Applicants to strike the Testimony of Qwest Communications Corporation ("Qwest") and Cox Communications ("Cox") and (2) the Motion of Qwest for a "protective order" relieving Qwest of any obligation to produce strategic, business and marketing plans to Applicants. Joint Applicants assert that striking the testimony is warranted because Qwest and Cox have each refused to respond to discovery on a timely basis that would allow Applicants to rebut their testimony.

Responses to each of the motions were filed, respectively, by Qwest, Cox, and Applicants on July 22, 2005. For the reasons discussed below, both motions are hereby denied. The parties are directed to promptly produce any outstanding discovery as directed below.

Issues Relating to Qwest Discovery and Testimony

SBC states that Qwest has failed to produce discovery of its business and marketing plans, as well as other documents, such as the workpapers of its witness Axberg. SBC states that Qwest's refusal to produce its business and marketing plans is in violation of the July 5 ALJ Ruling.

The July 5 ALJ ruling directed that Qwest "shall be required to produce relevant documents that are responsive to Applicants' requests for business plans [and] marketing plans from the past two years that relate or pertain to Qwest's facilities or services in California, including business and marketing plans developed after the announcement of the SBC / MCI merger." July 5 Ruling at 11-12. Joint Applicants claim that Qwest has done nothing to discharge its obligation to conduct a reasonably diligent search for responsive documents.

Applicants argue that, as a result of Qwest's failure to comply with the ALJ ruling, they have been denied the opportunity to review Qwest's business and marketing plans in order to prepare cross-examination of Qwest's witness. Applicants claim that it is too late for Qwest to rectify the problem through some agreement to produce its business and marketing plans.

This ruling also addresses the related motion for a "protective order" also filed on July 19, 2005, by Qwest. In that related motion, Qwest claims that Applicants ignored the directive in the ALJ ruling of July 5, 2005, calling for the exchange of commercially sensitive documents between Applicants and Qwest on a reciprocal basis. Based on this claim, Qwest seeks to be relieved of its obligations to produce the documents in response to Applicants' discovery requests that were required in the July 5, 2005 ruling.

On June 1, Applicants served a first set of data requests on Qwest which, among other things, sought production of Qwest's business and marketing plans

from the past two years that relate or pertain to Qwest's facilities in service in California. Takemoto Decl. Ex. 1. After Qwest refused to produce any of its business and marketing plans, Applicants filed a motion to compel on June 24. The ALJ's July 5 ruling granted, in part, Applicants' June 24 motion to compel, and directed Qwest to respond the Applicants' data request subject to certain conditions and restrictions. Applicants report that despite the ALJ ruling, Qwest still has not produced a single business or marketing plan. Takemoto Decl. ¶ 14.

Qwest has taken the position that its business and marketing plans do not need to be produced unless they post-date the merger announcement and specifically mention the merger and its possible effects on Qwest. Joint Applicants argue, however, that the July 5 Ruling compels production not only of plans that post-date the merger announcement, but also of business and marketing plans "*from the past two years* that relate or pertain to Qwest's facilities or services in California, including business and marketing plans developed after the announcement of the SBC / MCI merger" (emphasis added)). Joint Applicants thus argue, Qwest should have produced business and marketing plans that relate to the provision of these services in California, in addition to any business or marketing plans that specifically identify the merger.

In anticipation of the Applicants' motion to strike, Qwest concurrently filed its Motion for a Protective Order. Qwest seeks to have the Protective Order apply to the same business planning documents that are the subject of Applicants' Motion to strike. In its motion and response to the Applicants' motion, Qwest takes issue with Applicants' claim of having produced planning documents. Qwest claims that Applicants have ignored the reciprocity requirements.

Qwest claims that Applicants have failed to cooperate in making planning documents reasonably accessible to Qwest by refusing to identify their planning documents by Bates number or to provide any other means of finding these "needles in the giant haystack." (Motion at 6). Qwest expresses skepticism about whether SBC's document production contains any business plans.[1] Qwest states in its Motion for a Protective Order, however, that it has been diligently investigating what responsive planning documents exist, and that its review continues. Qwest states that, if ordered to produce the documents, it will be able to do so in due course.

Parties have thus been unable to reach a common agreement of what documents are subject to the reciprocity requirements of the July 5 ALJ ruling.

SBC denies that it has failed to honor the ALJ ruling requirement for reciprocity. Instead, SBC claims that the documents sought by Qwest are not comparable, nor reciprocal to the Qwest documents sought by SBC. SBC claims that its document production contains national and regional business planning documents for the past three years. Takemoto Decl. ¶ 8, Ex. 7. Applicants argue that Qwest should know this because its inside and outside counsel have been given access to these documents. *Id.* ¶ 7. Applicants further claim that SBC's business and marketing plans have already been reviewed by Qwest's inside and outside counsel. *Id.* ¶¶ 7-8. SBC has thus objected to producing certain types of data *in addition to* the business plans it has already produced.

SBC responds that Qwest has never argued that its counsel were somehow unable to find and review the business plans in SBC's production on June 22, and

[1] *See* Mot. at 6 (stating that Applicants are "*claiming* that they produced planning documents . . ." (emphasis added)).

Qwest's counsel has not returned to review SBC's documents since June 22. Stofferahn Decl. ¶ 6.

SBC claims that with one exception,[2] none of Qwest's data requests (referred to as the "Qwest Planning DRs," *see* Motion at 3) ask for the production of Applicants' business plans regarding California-based services or more broadly.[3] The "Qwest Planning DRs" instead consist of a series of interrogatories based on the testimony of Applicants' witnesses. SBC affirms, nonetheless, that it has made the business plans it produced in response to other parties' data requests available to Qwest.[4] The "Qwest Planning DRs" thus provide no support for Qwest's claims regarding "reciprocity."[5]

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[2] SBC claims that only one of the "Qwest Planning DRs" actually requests business plans. Data request 3-26 requests the production of documents, including business plans, that relate to "SBC's intentions to expand the deployment of the CallVantage product." This request appears to focus on SBC's plans with respect to the merged company. SBC's counsel explained to Qwest that the only documents relating to post-merger forecasts of which SBC is aware are documents related to the national and California synergies analyses. Sherr Decl. Ex. A (July 18 Patrick Thompson email). Qwest has disclaimed a need to review these analyses and documents related to them.

[3] SBC's business plans have been made available to Qwest because other parties propounded data requests that led to their production, and Qwest propounded a data request for all documents produced to other parties.

[4] SBC objected to providing responses to certain of the "Qwest Planning DRs" that seek information about the specific terms and conditions pursuant to which Applicants intend to offer special access services post-merger. *See* Sherr Decl. Ex. A (July 18 Patrick Thompson email). Applicants have not requested that Qwest produce this type of granular detail regarding Qwest's operations, and thus do not believe production of this information comes within the "reciprocity" requirements of the July 5 ALJ ruling.

[5] Qwest also criticizes SBC for not identifying by bates number the business plans produced in response to the "Qwest Planning DRs." Mot. at 5-6. But neither the "Qwest Planning DRs" nor Qwest's other data requests call for the production of SBC's

Footnote continued on next page

SBC disputes Qwest's claim that it refused to narrow its data requests regarding Qwest's business plans.[6] SBC affirms that it narrowed its data requests during meet and confer based on the limited information it has about Qwest's business planning process, informing Qwest that it is "interested in documents sufficient to show Qwest's business and marketing plans (instead of every document that might contain responsive information)." Sherr Decl. Ex. A (July 14 Patrick Thompson email). SBC also asked Qwest to advise whether further limitations might be appropriate. Stofferahn Decl. ¶ 7. Qwest has produced nothing in response to these narrowed requests.

Discussion

While both Applicants and Qwest accuse each other of failing to comply with the directives of the July 5 ALJ ruling, neither side is seeking an order to enforce compliance with prior rulings relating to discovery. Instead, each side is seeking other remedies on the assumption that requested discovery will not be provided. Yet, neither of the remedies sought alternatively by the Applicants and by Qwest is an appropriate remedy. Rather, the appropriate solution is for each side to the dispute to produce pertinent documents in response to outstanding discovery requests.

Contrary to Qwest's claims, it appears that SBC generally has made a reasonable effort to comply with the reciprocity requirements set forth in the

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business plans. Thus, SBC argues that it has not violated the May 24 Ruling in any of its responses to Qwest's data requests.

[6] Motion at 5 (asserting that "despite the ALJ's direction that they narrow their requests, the Applicants have insisted that Qwest produced the full substantive range of planning documents they demanded in their First Set of Data Requests.")

July 5 ALJ ruling, and has provided business planning documents to Qwest that were previously provided to other parties. It is concluded, however, that SBC has construed the reciprocity requirements too narrowly in one respect. SBC counsel in a referenced email claimed that Qwest's "specific requests seeking granular information about the terms and conditions pursuant to which Applicants intend to provide special access services post merger" were not "business plans" under SBC's interpretation, and that SBC had not sought similar information from Qwest. (Qwest Motion at 7.) Qwest responds that SBC's interpretation is unreasonably narrow in claiming that such "granular information" was not covered under the reciprocal exchange requirements of the July 5 ALJ ruling.

It is hereby clarified that such "granular information" relating to the terms and conditions pursuant to which Applicants intend to provide special access services post merger reasonably should be interpreted as coming within the general category of business planning documents subject to the reciprocal exchange requirements of the July 5 ALJ ruling. Even if the requested information is of a more granular nature than what SBC has requested, the subject matter of the request still relates closely enough so that it should be deemed to be reciprocal. Accordingly, SBC is directed to provide these documents to Qwest without delay. To the extent it may not already have done so, SBC shall also provide Bates number identification of the pertinent documents that are responsive to the Qwest discovery.

It is further concluded that SBC has generally made reasonable efforts to narrow the range of requested documents, as directed in the July 5 ALJ ruling. In any event, Qwest has failed to show that SBC's actions in responding to discovery provide justification to relieve Qwest of its own obligations to produce

discovery in compliance with the July 5 ALJ ruling. Accordingly, Qwest's motion for a "protective order" is denied.

Qwest states in its Motion for a Protective Order that it has been diligently investigating what responsive planning documents exist, and that its review continues. Qwest states that, if ordered to produce the documents, it will be able to do so "in due course." Accordingly, Qwest is hereby ordered to produce the documents that are responsive to Applicants' outstanding data requests for business and planning documents without delay, as prescribed in the July 5 ALJ ruling. Responsive documents that Qwest has already identified shall be produced by July 29, with its complete response no later than August 3, 2005. The July 5 Ruling compels production not only of plans that post-date the merger announcement, but also from the past two years that relate or pertain to Qwest's facilities or services in California, including business and marketing plans developed after the announcement of the SBC / MCI merger. Failure to comply with this ruling may be grounds for reconsideration of the motion to strike Qwest testimony.

Likewise, Applicants' motion to strike Qwest's testimony is denied. Rather than striking the testimony, the appropriate remedy is for Qwest to produce the outstanding discovery, as directed above. With the production of outstanding discovery, as directed in this ruling, Applicants should have sufficient time to prepare for cross examination of the Qwest witness. Applicants have estimated only one hour of cross examination time for Axberg, and she will likely not be scheduled to testify until the week of August 15. Given these schedule parameters, Applicants have not shown that they will be prejudiced in their ability to prepare cross examination for the Qwest testimony.

Issues Relating Cox Discovery and Reply Testimony

Joint Applicants also move to strike the Reply Testimony of Joseph Gillan offered on behalf of Cox based on the claim that delays in receiving discovery have prejudiced its ability to prepare cross examination. Therefore, Applicants move to strike the testimony to remedy the problem.

SBC served Cox with data requests on June 27, the next business day after Cox filed its Reply Testimony. Takemoto Decl. Ex. 19. SBC's data requests sought to obtain Gillan's workpapers and test the factual basis for his assumption that the merger will have adverse consequences on Cox.

On June 29, Cox informed SBC that it would not respond to SBC's discovery based on its interpretation that the ALJ's June 22 Ruling[7] prevented SBC from propounding discovery after June 24. Takemoto Decl. Ex. 11. After the parties met and conferred, on July 12 they called the ALJ, and received clarified that the June 24 discovery cut-off applied to parties other than Applicants. Takemoto Decl. ¶ 22. Accordingly, Cox contends that it was not until July 13 that Cox's obligation to respond to Joint Applicants' Data Requests was established

Cox then proposed serving objections and responses to SBC's data request on July 29 and producing documents on August 5. Takemoto Decl. Ex. 12. SBC proposed instead that Cox serve responses by July 22 and produce documents by July 29. Takemoto Decl. Ex. 12 at 3. Cox agreed only to serve objections, but not substantive responses, by July 22. Cox refused to commit to serving substantive responses prior to July 29 or to producing documents prior to August 5, the last business day before the evidentiary hearings begin.

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[7] *See* Administrative Law Judge's Ruling Denying Motion to Extend the Schedule and Granting, in Part, Discovery Limits, entered June 22, 2005.

Applicants argue that no other party has required so long for responding to data requests. The ALJ's June 23 Ruling[8] required other parties to respond to Applicants' data requests within one week of filing Reply Testimony. Moreover, Applicants argue that many of the requested documents should be readily available to Cox, and that there is no legitimate reason why it should take Cox three weeks to produce these documents.

In its response to Applicants' motion, Cox argues that the motion does not present a complete picture of parties' discovery disputes, and that based on the facts, there is no reason to strike its testimony. Cox informed Applicants on approximately May 19 that Cox was in the process of reviewing pleadings to determine if it would file testimony. Cox and Joint Applicants did not correspond with respect to this proceeding from May 20 through June 23. On June 24, Cox filed testimony of Joseph Gillan.

Cox offered to provide all responsive documents to Applicants by August 3, but that offer was rejected on the basis that Applicants had to have all documents by July 29. Cox stated several reasons for the proposed response date.[9] Cox sent a letter, dated July 15, 2005, to Joint Applicants committing to provide responsive documents by July 29, along with a guarantee that all

[8] *See* Administrative Law Judge's Ruling Treating Data Requests as if Served on June 24, 2005, entered June 23, 2005.

[9] Accordingly, Joint Applicant's statement that the "only justifications Cox offered for this delay were that its counsel's "principal contact" at Cox is on vacation and that Cox is busy with other, unidentified regulatory proceedings" is not accurate.

responsive documents, to the extent that there are any, would be sent by August 3.[10]

Joint Applicants suggest that the testimony should be stricken or else, they will be deprived of a fair opportunity to prepare for cross-examination of Cox's witness. Cox responds that any delay in getting responses is due to Joint Applicant's behavior. Cox informed Joint Applicants on July 15 that Cox was committed to providing responses to data requests by the week of July 25, and thereby, Cox argues that the Motion is moot.

Joint Applicants complain that Cox has not responded to two data requests after Joint Applicants informed Cox on July 14 that Joint Applicants must have responses to all requests within two business days. Specifically, the limited basis for the Motion concerns Cox not responding to data requests that were "designed to obtain Gillan's workpapers."[11] Yet, Cox notes that of the thirty-five data requests (including subparts) sent to Cox, there is one question that refers to the workpapers of Gillan. A second data request generally seeks documents supporting the witness testimony. Thus, there are only two Data Requests related to the testimony that form the basis for the motion. Joint Applicants do not contend that responses to the other thirty-three requests will impair their ability to prepare for hearing.

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[10] Exhibit 2.

[11] The Motion states" When Cox filed its Reply Testimony, however, SBC served Cox with data requests on the next business day, June 27. Takemoto Decl. Ex. 19. The data requests were designed to obtain Gillan's workpapers and test the factual basis for his assumption that the merger will have adverse consequences on Cox." Motion, pp. 5-6.

Cox dispute Joint Applicants' argument that they will not have a reasonable opportunity to prepare for cross-examination. The Commission has previously concluded that the failure to timely turn over workpapers is not a proper basis for granting a motion to strike.[12] Since the Joint Applicants will have the opportunity to cross-examine Gillan and will have responses to the Data Requests, they will not be prejudiced by the Cox testimony.

Moreover, Cox argues that Joint Applicants are the source of the delay in both issuing the discovery and resolving discovery disputes, and failed to mitigate problems associated with the delay.

Discussion

Applicants have not provided reasonable justification to strike the Cox testimony. The above summary of facts indicates that Cox acted with reasonable diligence to comply with Applicants' discovery requests. Moreover, as noted above, Cox sent a letter, dated July 15, 2005, to Joint Applicants committing to provide responsive documents by July 29, along with a guarantee that all responsive documents, to the extent that there are any, would be sent by August 3. Cox shall be held to this commitment.

Accordingly, Joint Applicant's will have the responses prior to the commencement of the hearings. Further, Gillan is not available to testify until August 16 and therefore, Joint Applicants should have sufficient time to review the responses. Accordingly, Applicants should have sufficient time to prepare for cross examination of the Cox witness. The Motion to strike the testimony of Cox is accordingly denied.

[12] Decision 87-03-030.

IT IS RULED that:

1. The Applicants' motion, filed July 22, 2005, to strike testimony of Qwest and Cox as described above is hereby denied.

2. Qwest's motion, filed July 22, 2005, for a Protective Order is hereby denied.

3. Applicants and Qwest are hereby directed to promptly discovery documents in accordance with this ruling, as set forth above.

Dated July 27, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Applicants' Motion to Strike Qwest and Cox Testimony and Motion of Qwest for a "Protective Order" on all parties of record in this proceeding or their attorneys of record.

Dated July 27, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

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